IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 20, 2006

RODNEY LARON COVINGTON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2001-C-1399 Steve Dozier, Judge

No. M2005-01893-CCA-R3-PC - Filed 7/13/06

The Appellant, Rodney Laron Covington, appeals the Davidson County Criminal Court's denial of his petition for post-conviction relief. On appeal, Covington argues that he was denied his Sixth Amendment right to the effective assistance of counsel. After review of the record, we affirm the denial of post-conviction relief.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and NORMA MCGEE OGLE, JJ., joined.

J. Chase Gober, Nashville, Tennessee, for the Appellant, Rodney Laron Covington.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; Victor S. (Torry) Johnson III, District Attorney General; Pamela Anderson and Amy H. Eisenbeck, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

Factual Background

In May of 2002, the Appellant was convicted by a Davidson County jury of one count of rape of a child and two counts of aggravated sexual battery. The trial court subsequently imposed an effective sentence of twenty years imprisonment. On direct appeal, the Appellant's convictions and sentences were affirmed. *State v. Rodney Laron Covington*, No. M2002-02714-CCA-R3-CD (Tenn. Crim. App. at Nashville, Jan. 23, 2004).

The relevant facts as summarized by this court on direct appeal established:

> The victim's family and the Appellant became extremely close over the years, and the victim's mother described the Appellant as part of her "extended family. . . ."

> Often, the Appellant kept the victim and her brother for weekends or while her parents worked.
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> When the victim was in the seventh grade, she confided to friends that she had been raped as a younger child. This was ultimately reported and a school counselor contacted the victim's mother. Thereafter, an investigation began. The Appellant, after being interviewed by a Metro Police Detective, denied any sexual involvement with the victim. Nonetheless, the Appellant stated that, "in 1992 or 1993," when the victim was "around five years old," the victim on several occasions touched him in an inappropriate manner while at his apartment. . . .
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> On July 27, 2001, the Appellant was indicted on four counts of rape of a child and four counts of aggravated sexual battery. The indictment was subsequently amended to reflect that these offenses, as charged in each of the eight counts, occurred on "a date between 8/1/93-8/1/95." Prior to trial, the trial court dismissed one count of child rape and two counts of aggravated sexual battery, upon motion of the State, leaving three counts of rape of a child and two counts of aggravated sexual battery.
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> . . . .
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> The victim, age fourteen at trial, provided testimony regarding the alleged incidents of sexual abuse, which occurred in 1993 and 1994. She was unable to give specific dates for any of the incidents but indicated that they probably occurred sometime during the period when she was between kindergarten and the second grade. The victim explained that, during each occasion which involved sexual penetration, the Appellant would first order her to remove her pants and underwear, and then pick her up and place her on his lap facing him. He would then insert his penis in her vagina and move her "back and forth." The victim identified different occurrences by stating that the first time this happened she found blood in her underwear later that evening as she was getting into the bathtub.

Id.

In January of 2005, the Appellant filed a *pro se* petition for post-conviction relief alleging that he was denied the effective assistance of counsel. Following the appointment of counsel, an amended petition was filed, and an evidentiary hearing was held on July 1, 2005. The post-conviction court denied relief by written order on July 7, 2005. This timely appeal followed.

Analysis

The Appellant contends that he was denied his Sixth Amendment right to the effective assistance of counsel at trial. To succeed on an ineffective assistance of counsel claim, the Appellant

bears the burden of establishing the allegations set forth in his petition by clear and convincing evidence. T.C.A. § 40-30-110(f) (2003). The Appellant must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), the Appellant must establish: (1) deficient performance and (2) prejudice resulting from the deficiency. The petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This deference to the tactical decisions of trial counsel is dependent upon a showing that the decisions were made after adequate preparation. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

It is unnecessary for a court to address deficiency and prejudice in any particular order, or even to address both if the petitioner makes an insufficient showing on either. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069. In order to establish prejudice, the petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Burns*, 6 S.W.3d 453, 463 (Tenn. 1999) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068) (citations omitted)).

The issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact. *Id*. at 461. "[A] trial court's *findings of fact* underlying a claim of ineffective assistance of counsel are reviewed on appeal under a *de novo* standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise." *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001) (citing Tenn. R. App. P. 13(d); *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997)). However, *conclusions of law* are reviewed under a purely *de novo* standard with no presumption that the post-conviction court's findings are correct. *Id*.

Preliminarily, we are constrained to note the Appellant's failure to present an adequate record of the issue for review. On appeal, he argues that prior to amendment, his original indictment alleged that the offenses occurred on dates of "1992 and 1993." Although this is the only reference to the original date of the indictment in this record, it is fundamental that statements contained in an appellate brief do not equate to authenticated facts. Neither the original or amended indictment is included in the record on appeal, nor were they introduced at the post-conviction hearing. Furthermore, at the hearing, no reference to the original date of the indictment was made, nor was any attempt made to develop any dates regarding the various counts of the original or amended indictment resulting in convictions. When a document is challenged on appeal, it is essential that that document be included in the appellate record, otherwise the reviewing court is precluded from review of the issue on the merits. *See* Tenn. R. App. P. 24(b). Notwithstanding, we take notice of this court's holding in the Appellant's direct appeal that an amendment to the indictment occurred and that the amendment impacted the "100 % release eligibility requirement," inferring that the crime was committed after July 1, 1992, the effective date of the violent offender enactment.

The Appellant contends that trial counsel's representation was deficient because counsel consented to an amendment of the indictment on the morning of trial which reflected that the offense of rape of a child occurred on "a date between 8/1/93 - 8/1/95." He asserts that the "original Indictment alleges dates in 1992 and 1993." The Appellant does not argue that the amended date is incorrect. Rather, he argues that prior to July 1, 1992, the unlawful penetration of a victim less than thirteen years of age constituted aggravated rape, and, if convicted of this crime, he would have been sentenced as a Range I offender with a thirty percent release eligibility date. *See* T.C.A. § 39-13-502(a)(4) (1991).[1] Effective July 1, 1992, our legislature codified the crime of rape of a child and designated the crime as a violent offense which carries a 100 percent release eligibility date. *See* T.C.A. § 39-13-522 (2003). Thus, the Appellant argues that, as a result of trial counsel's consent to the amendment, he is now serving the sentence for rape of a child as a violent offender as opposed to a Range I, standard offender.

Proof of deficient representation by omission requires more than a bare allegation of some lost potential benefit. As such, Appellant is required to show by clear and convincing evidence: (1) the objection to the amendment would have been sustained and (2) that there was a reasonable probability that the proceedings would have concluded differently if counsel had performed as suggested.

Our rules of criminal procedure provide that:

> [a]n indictment, presentment or information may be amended in all cases with the consent of the defendant. If no additional or different offense is thereby charged and no substantial rights of the defendant are thereby prejudiced, the court may permit an amendment without the defendant's consent before jeopardy attaches.

Tenn. R. Crim. P. 7(b).[2]

At the evidentiary hearing, trial counsel testified that when the State filed a motion to amend the indictment, he discussed the issue with his client and did not file an objection because "the amendment to the Indictment was consistent with discovery, . . . there was no surprise." He added, "my file reflects that I was aware of the variants between the indictment and the proof and was hopeful of exploiting it." The post-conviction court found that trial counsel's decision not to object to the amendment was not error "because there was no legal basis to object since the changes made were consistent with the discovery in this case and actually lessened the time frame of the allegations."

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[1] The Sentencing Commission Comments to Tennessee Code Annotated section 39-13-502 (2003) state that the former "subdivision (a)(4) [of aggravated rape] concerning rape of a child less than thirteen years of age has been moved to § 39-13-522."

[2] Rule 7 was amended effective July 1, 2006.

Although the date of the offense, as amended, was correct, the record unquestionably demonstrates that the amendment adversely impacted the Appellant's release eligibility date. Likewise, it is also clear that had trial counsel objected to the amendment of the indictment, the State could have entered a *nolle prosequi* of the charge of rape of a child and resubmitted the case to another grand jury for the purpose of correcting the date of the offense. *See State v. Costen*, 213 S.W. 910 (Tenn. 1919). There is nothing before us which remotely suggests that had defense counsel objected and a subsequent trial occurred following re-indictment, that a "reasonable probability" exists that the result of the later occurring trial would have been different from the trial verdict now under review.

Indeed, as noted *supra*, this court concluded on direct appeal that the proof conclusively established that the offense of rape of a child occurred in 1993, and, thus, subsequent to July 1, 1992, the effective date of Tennessee Code Annotated section 39-13-522. Accordingly, the Appellant, as a violent offender, was subject to mandatory service of his entire sentence. *Covington*, No. M2002-02714-CCA-R3-CD. As such, we conclude that the Appellant was not prejudiced by trial counsel's failure to object to the amendment of his indictment for rape of a child.

CONCLUSION

Based upon the foregoing, we affirm the dismissal of the petition for post-conviction relief by the Davidson County Criminal Court.

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DAVID G. HAYES, JUDGE